Shook, Hardy & Bacon L.L.P.

OCTOBER 14, 2010

PRODUCT LIABILITY LITIGATION REPORT

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U.S. SUPREME COURT AGREES TO HEAR APPEALS ON STATE COURT JURISDICTION OVER FOREIGN MANUFACTURERS

The U.S. Supreme Court has added to its 2010-2011 docket two products liability cases that raise the issue of state-court jurisdiction over foreign manufacturers selling allegedly defective products in the United States. *J. McIntyre Machinery, Ltd. v. Nicastro*, No. 09-1343, *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76 (U.S., *certiorari* petitions granted September 24, 2010). In both cases, the lower courts determined that these manufacturers could be sued in their states' courts.

In New Jersey, Robert Nicastro sued the U.K.-based company that made the metal-cutting machine that allegedly amputated his fingers. The company, which sold the machine through its exclusive U.S. distributor, asks the Court to consider whether "a 'new reality' of 'a contemporary international economy' permit[s] a state to exercise, consonant with due process under the United States Constitution, in personam jurisdiction over a foreign manufacturer pursuant to the stream-of-commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer."

In North Carolina, the families of two 13-year-old boys who died in a car crash in France filed suit against a tire manufacturer and its foreign affiliates, alleging that a defective tire made in Turkey and sold in the state caused the accident. The defendant presents the following question to the Court: "Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products placed in the stream of commerce by the defendant."

Manufacturing interests reportedly contend that if state courts are allowed to exercise jurisdiction over foreign companies, they may be reluctant to do business in the United States and U.S. companies may be at risk of similar litigation in other countries. Plaintiffs apparently counter that U.S. consumers will have no recourse if they cannot sue foreign companies in U.S. courts. Legislation (H.R. 4678, S. 1606) that would require foreign manufacturers to submit to the jurisdiction of domestic judicial and regulatory authorities by mandating that they designate a registered agent to accept service of process is currently languishing in Congress. *See Product Liability Law 360*, September 28, 2010.

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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FEDERAL MDL COURT DISMISSES AIR CRASH CLAIMS ON INCONVENIENT FORUM GROUNDS

A multidistrict litigation (MDL) court in California has dismissed dozens of consolidated claims filed against Air France arising out of an air disaster on a flight between Brazil and France that killed all 228 passengers and crew. *In re Air Crash over the Mid-Atl. on June 1, 2009*, MDL No. 10-2144 (U.S. Dist. Ct., N.D. Cal., decided October 4, 2010). The passengers and crew were mainly French or Brazilian, with the exception of two American passengers living in Brazil when the accident occurred. Because there were two "domestic plaintiffs," the court refused to dismiss the claims for lack of subject matter jurisdiction under a treaty, the MC, that gives jurisdiction to courts in the "the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence."

While the treaty is silent as to the U.S. doctrine of *forum non conveniens*, or inconvenient forum, the court determined that it does not override the court's power to dismiss an action on this basis. The plaintiffs argued that French courts would not provide an adequate alternative forum, because civil actions progress there at a slower pace. According to the court, this did not outweigh other aspects of the litigation that made the United States an inconvenient forum, including that criminal and civil investigations were underway in France and all recovered physical evidence was located there. The court also noted that because foreign plaintiffs cannot sue Air France in the United States and because some of the domestic manufacturing defendants might not be able to assert contribution claims against Air France here, the court determined that France would provide the superior forum for pursuing the claims.

The court conditioned its dismissal order on defendants making themselves amenable to suit in France and abiding by "all stipulations made in their Motions and at oral argument." The court also conditioned dismissal on defendants not seeking or arguing "for a stay of any civil proceedings commenced in France."

PROCEEDINGS AGAINST DOMESTIC AIRCRAFT MANUFACTURERS FOR CRASH IN CAMEROON DISMISSED

A federal court in Illinois has dismissed, on inconvenient forum grounds, claims filed by the families of passengers and crew killed in a 2007 aircraft accident in Cameroon. *Claisse v. The Boeing Co.*, No. 09-3722 (U.S. Dist. Ct., N.D. Ill., E. Div., decided September 28, 2010). The defendants designed or made the aircraft and/or its components and were all domestic manufacturers. None of the decedents was a resident or citizen of the United States. The court analyzed whether Cameroon would provide an adequate alternative forum and, despite some differences in procedures and undocumented allegations that the courts in that country were corrupt and unjust, determined that it would. The defendants agreed that they would submit to the jurisdiction of a Cameroon court and that they would not assert a *res judicata* defense. They also agreed to toll the statute of limitations for 120 days after dismissal of the U.S. action.

With most of the witnesses and evidence located in Cameroon and because Kenya Airlines is an essential party and cannot be sued in the United States, the court was convinced that Cameroon would be a more appropriate forum for the action. It was also reluctant to burden Illinois courts with interpreting and applying Cameroon law and Illinois citizens with litigation having no significant connection to their state.

MDL COURT RULES TOY MANUFACTURER'S REFUND PROGRAM SUPERIOR TO CLASS CERTIFICATION

A federal court in Illinois has denied the motion for class certification filed by the lead plaintiffs in multidistrict litigation (MDL) seeking damages and injunctive relief against the manufacturer, distributor and three major retailers of a children's toy product that was recalled after it was found to be tainted with the "so-called date rape drug GHB." *In re Aqua Dots Prods. Liab. Litig.*, MDL No. 1940 (U.S. Dist. Ct., N.D. Ill., E. Div., decided October 4, 2010).

Noting a split in authority among the courts that have considered the matter, the court decided to adopt a "policy approach" in analyzing the superiority requirement of Federal Rule of Civil Procedure 23, in the context of whether "a defendant-administered refund program may be found superior to a class action." The court discussed how nearly half the products purchased had been returned after the Consumer Product Safety Commission announced that it had been recalled and also noted "at least 513,869 consumers managed to procure refunds—all without the assistance of counsel or the court." The court found it significant that "[n]ot one lead plaintiff, however, has ever tried to return an Aqua Dots toy to Spin Master or to the store from which it was purchased."

According to the court, "At bottom, this is a suit to recover the purchase price of tainted Aqua Dots. Since the defendants will provide a refund—without needless judicial intervention, lawyer's fees, or delay—to any purchaser who asks for one, there is no realistic sense in which putative class members would be better off coming to court." Thus, the court refused to certify any of the proposed classes, which included a nationwide class and several combinations of state subclasses.

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The court also discussed the difficulties of certifying the unjust enrichment subclasses because they "are fraught with procedural and choice-of-law problems that further preclude certification." The court addressed them separately, finding "they provide the most vivid illustration of the generally unwieldy and slipshod state of the lead plaintiffs' proposed class action" and that "the case law is replete with recent efforts by class-action attorneys to certify multistate unjust enrichment subclasses. The recurring problems with this strategy therefore warrant analysis." In light of these issues, the court found an alternative ground for denying class certification.

NEW JERSEY SUPREME COURT FAULTS TRIAL COURT'S CLASS-CERTIFICATION ANALYSIS IN CONSUMER-FRAUD ACTION

The New Jersey Supreme Court has reversed lower court rulings denying a motion to certify a statewide class of consumers who purchased a dietary supplement that allegedly fails to deliver its promised benefits. ***Lee v. Carter-Reed Co., L.L.C.*, No. A-38-09 (N.J., decided September 30, 2010)**. The plaintiff alleged that none of the product claims—shrinks belly fat, improves users' mood, balances hormone levels, reduces anxiety, alters mood—was true and that the product distributor offered a false testimonial from a purported doctor to support the claims.

The supreme court faulted the trial and intermediate-appellate courts with failing to accept as true the named plaintiff's "detailed allegations that all of Relacore's advertisements were false. Because those courts failed to give a deferential view to [the plaintiff's] case at the class-certification stage, they applied legal principles to a distorted picture of the record." According to the court, "the trial court and Appellate Division implicitly assumed that Relacore produced some of the benefits advertised. That assumption made causation a perplexing problem, the resolution of which would depend on a number of individual inquiries." In fact, the trial court identified 14 individual questions, each of which "assume that Carter Reed will prevail in showing that Relacore provides as least some of the benefits for which it has been marketed."

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When the record is viewed in the light most favorable to the plaintiff, "common issues of law and fact predominate over individual ones," states the court. The state consumer fraud law "provides relief to plaintiff and the putative class if Carter Reed engaged in the deceptive marketing of Relacore and plaintiff and the class members suffered an ascertainable loss causally related to that unlawful practice.… Under [the plaintiff's] scenario, the ascertainable loss here is the cost of a bottle of broken promises; each container of Relacore, when not refunded is an out-of-pocket loss."

The court found it unlikely that thousands of individual consumers would file actions in small claims court for "buying a worthless product that cost only about $40," thus making a class action "a superior vehicle and perhaps the only practical vehicle for consumers who were allegedly deceived into purchasing Relacore." The case was remanded for further proceedings.

FDA WARNING LETTER FOLLOWED BY CONSUMER FRAUD LAWSUITS AGAINST MOUTHWASH MANUFACTURER

Immediately after the Food and Drug Administration (FDA) issued a **warning letter** to Johnson & Johnson Consumer Products, Inc. to challenge the company's promotion of Listerine Total Care Anticavity Mouthwash® as an anti-plaque product,

putative class actions alleging consumer fraud were filed against the company in California and Florida. *Britton v. Johnson & Johnson, McNeil PPC Inc.*, No. 10-04450 (U.S. Dist. Ct., N.D. Cal., filed October 1, 2010); *Pelkey v. McNeil Consumer Healthcare*, No. 10-61853 (U.S. Dist. Ct., S.D. Fla., filed October 5, 2010).

The California plaintiff reportedly seeks to certify a nationwide class of consumers and asks the court for compensatory and punitive damages. The Florida plaintiff seeks to certify a statewide class of consumers and seeks restitution and disgorgement as well as an injunction to stop the alleged unlawful practices.

The FDA warning letter refers to the claims appearing on the product label and asserts that its disease prevention text ("Helps prevent cavities") makes the product a drug. The letter also contends that because the mouthwash "is not generally recognized as safe and effective for the antiplaque indications in its labeling, … it is, therefore, a new drug [which] may not be introduced or delivered for introduction into interstate commerce unless it is the subject of an FDA-approved application." According to the letter, the marketing of the product without an FDA-approved application violates the Federal Food, Drug, and Cosmetic Act. FDA gives the company 15 working days from receipt of the letter to correct the identified violations. *See Mealey's Class Actions*, October 7, 2010.

It has become increasingly common in the United States for consumer fraud lawsuits to follow regulatory action against a product manufacturer. These cases are part of the trend, and both refer to the FDA action to bolster their allegations.

ALL THINGS LEGISLATIVE AND REGULATORY

Proposed Legislation Would Allow Retired Justices to Hear U.S. Supreme Court Cases

Senator Patrick Leahy (D-Vt.) has introduced **legislation** that would allow a retired U.S. Supreme Court justice to hear a case when an active justice decides it would be a conflict of interest to participate in the Court's consideration of the matter.

Under the proposal, the retired justice would serve if "a majority of active justices vote to designate and assign that retired chief justice or associate justice."

Congress currently allows the chief justice to designate and assign retired justices to any federal circuit court but not the U.S. Supreme Court, a law that Leahy evidently views as ironic. "Retired justices may be designated to sit on any court in the land except the one to which they were confirmed," he said in a September 29, 2010, press release. "The bill I am introducing today will ensure that the Supreme Court can continue to serve its essential function. In recent history, justices have refused to recuse themselves and one of their justifications has been that the Supreme Court is unlike lower courts because no judge can serve in their place when justices recuse."

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His proposal would also allow the U.S. Supreme Court to avoid the possibility of a tie, Leahy asserted. "When a justice needs to recuse from a matter under the rules that govern judicial conflicts of interest, the Supreme Court may be rendered ineffective, because there are no provisions in place to allow another to be designated to sit in his or her place," he was quoted as saying. "Given the court's recent rash of 5-4 rulings, the absence of one justice could result in a 4-4 decision. In that scenario, the Supreme Court cannot serve its function and the lower court decision stands."

LEGAL LITERATURE REVIEW

Trio of *Iqbal/Twombly* Articles Recently Released

- **Arthur Miller, "From Conley to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure," *Duke Law Journal* (2010)**

New York University Law Professor Arthur Miller discusses at some length how the U.S. Supreme Court's adoption of a plausibility pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* has affected "the model of civil litigation established by the Federal Rules of Civil Procedure in 1938." Miller addresses "the basic values underlying that system and its importance in promoting broad citizen access to our federal courts and enabling the private enforcement of substantive public policies." Miller's premise is that "too much attention" has been given to unsubstantiated claims about litigation expense and possible abuse "and too little on citizen access, a level litigation playing field and other values of civil litigation." He provides suggestions for the rules advisory committee to consider "to reverse recent developments and ameliorate some of their negative aspects." His concerns are evident in the ultimate question he poses: "after *Twombly* and *Iqbal,* is our American court system still one in which an aggrieved person, however unsophisticated and under-resourced he may be, can secure a meaningful day in court?"

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- **Alexander Reinert, "The Costs of Heightened Pleading," *Indiana Law Journal* (forthcoming 2011)**

This article appears to fill at least one of the gaps identified by Miller; it provides "empirical data to question the widespread assumption about the benefits and costs of heightened pleading." Benjamin N. Cardozo School of Law Assistant Professor Alexander Reinert examined appellate and trial court decisions from 1990-1999 to determine whether "pleadings that would get by under a notice pleading standard but not a heightened pleading standard—what I refer to as 'thin' pleadings—are just as likely to be successful as those cases that would survive the heightened pleading standard." Reinert, who litigated *Ashcroft v. Iqbal,* and is an acknowledged critic of the U.S. Supreme Court's ruling, concludes, "there is no correlation between the heft of a pleading and the ultimate success of the case." Despite the inherent risks in attempting to quantify outcomes, the author contends, "the data here suggest that

the costs imposed by heightened pleading may be substantial and may not create the assumed benefits. In this sense, a heightened pleading standard may function in the same way that randomized dismissal would, amounting to a radical departure from pleading standards that few would find satisfactory."

- **Hillel Levin, "*Iqbal, Twombly* and the Lessons of the *Celotex* Trilogy," *Lewis & Clark Law Review* (2010)**

This article compares the process that led the U.S. Supreme Court to change the standards courts apply when presented with a motion for summary judgment to the process that led it to adopt the plausibility pleading standard. University of Georgia Law School Professor Hillel Levin contends that such changes trickle up from the lower courts, which "are invested in docket control mechanisms and … stand to benefit from decreasing access and enhancing the role of the judge." Among the lessons Levin gleans from parallels he finds between the summary-judgment and pleading change records are the following: (i) "we should expect to see courts struggle to understand and apply the plausibility standard for some time"; (ii) "the plausibility standard may not necessarily introduce efficiencies and cost-savings for defendants into the system"; (iii) "we should not expect the pleading context to be the final impediment to access for plaintiffs to the courts"; and (iv) "the Supreme Court was pushed to its current jurisprudence *by lower courts*." Levin concludes that the lack of trial court experience on the U.S. Supreme Court bench is less determinative of these matters than a court's ideology.

LAW BLOG ROUNDUP

Litigation Explosion Deniers Relying on Official Undercounting?

"If joined cases, consolidated cases, class actions, mass tort settlements, and bankruptcy trust filings were included in tort claims filing data—as they properly should be—then there has indeed been a 'litigation explosion.'" Benjamin N. Cardozo School of Law Professor Lester Brickman, guest blogging about the litigant undercounts that appear in court data collected by the National Center for State Courts, Federal Judicial Center and RAND Institute for Civil Justice. He describes the "critical infirmities" of the published data in his forthcoming book, Lawyer Barons: What Their Contingency Fees Really Cost America (Cambridge Univ. Press, Jan. 2011).

TortsProf Blog, October 11, 2010.

One Point of View on No-Fault Vaccine Court

"Though Congress intended claims to be handled 'quickly, easily and with certainty and generosity,' the Vaccine Court has failed in every respect." A Center for Justice & Democracy consumer advocate, blogging about a case argued before the U.S. Supreme Court on October 12, 2010, and presenting the question whether all

claims, including design-defect allegations, against vaccine manufacturers must be litigated under the National Vaccine Injury Compensation Program.

ThePopTort, October 12, 2010.

Another Point of View on No-Fault Vaccine Court

"… a ruling in favor of the plaintiffs would allow hundreds of lawsuits asserting a link between vaccines and autism to go forward." *WSJ* lead law blog writer Ashby Jones, discussing the defense perspective on the vaccine case under consideration by the U.S. Supreme Court. Jones notes that the law establishing the Vaccine Court as a forum for resolving personal injury claims allegedly involving vaccinations sought to "strike a balance between the need to help those injured by vaccines and the desire to shield vaccine makers from a potentially stifling amount of product-liability litigation."

WSJ Law Blog, October 12, 2010.

THE FINAL WORD

Plaintiffs' Lawyers Call for "Equal Tax Treatment" in *National Law Journal* Article

Plaintiffs' attorneys have suggested in a recent **article** that the Internal Revenue Service treat contingent-fee lawyers' litigation costs as business-expense deductions rather than loans clients repay if the case is resolved in their favor, which can take years. Arguing that "there is never a guarantee of recovery," Brian Kabateck and Karen Liao assert that a more equitable system would allow law firms to deduct business expenses from taxable income the year they are incurred as other businesses are allowed to do.

"This looks like a simple quirk in the tax code that could easily be corrected," the authors opine. "Yet certain business interests that are typically opposed to plaintiffs' lawyers (and their clients) are similarly opposed to this change. They claim plaintiffs' lawyers would be receiving a 'windfall,' would become 'tax cheats' and wouldn't be paying their fair share of taxes, thus depriving the U.S. economy of billions of dollars in revenue." To these assertions, the authors argue that plaintiffs' lawyers subsidize litigation costs, not the federal government. "If a case yields no recovery, who has the most to lose?" they write.

Kabateck and Liao also reject "another absurd argument" that asserts equal tax treatment would encourage frivolous lawsuits. "There are far better tax deductions than throwing money away on an unmeritorious case," they write. "Like any other business, prudent plaintiffs' law firms invest their money only in cases they believe they will win."

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UPCOMING CONFERENCES AND SEMINARS

DRI, San Diego, California – October 20-24, 2010 – "15th Annual Meeting." Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner Chris Cotton will participate in a discussion on "Electronic Discovery: State of the Union—Electronic Discovery Reform and Best Practices." SHB Government Enforcement & Compliance Partner Carol Poindexter will address "Government Enforcement and Corporate Compliance: Perambulating the Pitfalls of Parallel Proceedings." SHB Class Actions & Complex Litigation Partner Tammy Webb will participate in a panel presentation on "Commercial Litigation: Six Hot Litigation Picks for 2011."

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).